

THE STATE OF NEW HAMPSHIRE
SUPERIOR COURT

ROCKINGHAM, SS.

SUPERIOR COURT

John Formella, Attorney General

v.

Christopher Hood, et al.

No. 218-2023-CV-00086

“Speech that demeans on the basis of race, ethnicity, gender, religion, age, disability, or any other similar ground is hateful; but the proudest boast of our free speech jurisprudence is that we protect the freedom to express ‘the thought we hate.’” Matal v. Tam, 582 U.S. 218, 246 (2017) (quoting U.S. v. Schwimmer, 279 U.S. 644, 655 (1929) (Holmes, J., dissenting)).

ORDER ON DEFENDANTS’ MOTIONS TO DISMISS

Attorney General John Formella (the “State”) brought three separate civil actions against Defendants Christopher Hood, Leo Anthony Cullinan, and the Nationalist Social Club-131 (“NSC-131”) under New Hampshire’s Civil Rights Act, RSA 354-B (the “Civil Rights Act”). See Docket No. 218-2023-CV-86, Doc. 1 (Hood Compl.); Docket No. 218-2023-CV-87, Doc. 1 (Cullinan Compl.); Docket No. 218-2023-CV-89, Doc. 1 (NSC-131 Compl.). Upon the State’s request, the Court consolidated all three cases into the

present action. See Doc. 19¹ (Order, March 1, 2023). Defendants Hood and Cullinan now move to dismiss. See Docs. 11 (Hood Mot. Dismiss); 22 (Cullinan Mot. Dismiss). The States objects to both motions. See Docs. 14; 21. For the reasons that follow, Hood’s and Cullinan’s motions must be **GRANTED** because the governments interpretation of RSA 351-B:1, as applied to the facts in this case, is unconstitutionally overbroad.

Background

Unless otherwise noted, the following facts are derived from the State’s Complaint against Hood as most facts are common to all three Complaints. See Doc. 1.

On July 30, 2022, the Portsmouth Police Department received 911 calls informing police that men were hanging signs that stated “Keep America White” from the Stark Street overpass, which overlooks Route 1 in Portsmouth.² See id. ¶¶ 16, 28; see also Docket No. 89, Doc. 1 at Attachment B (photo depicting a banner on the overpass reading “KEEP NEW ENGLAND [] WHITE []” with two characters of illegible text before and after “WHITE”). When police arrived on the scene, they observed approximately 10 men gathered on the overpass wearing hats, sunglasses, and face coverings emblazoned with “NSC-131” or “131.” See Doc. 1 ¶ 17.

According to the State, NSC-131 is an organization that describes itself as:

A pro-white, street-oriented fraternity dedicated to raising authentic resistance to the enemies of our people in the New England area. This takes the form of networking, training, activism, outreach, and above all action. . . .

We are a social club of nationalists from New England focused on building a network of likeminded men & women dedicated to defending their lands

¹ Unless otherwise noted, all citations to court filings are in reference to Docket No. 218-2023-CV-00086 following the consolidation of all three cases.

² As the State explains, while the initial 911 calls described the banner as reading “Keep America White,” photos reflect that the banner read “Keep New England White.” See Doc. 1 n. 1.

and their people. We oppose the criminal anti-American & anti-white street gangs such as MS13, Black Lives Matter, and ANTIFA. We are for us, by us, and against those against us.

Docket No. 89, Doc. 1 ¶ 12. NSC-131 is an unincorporated association without a fixed address but with members located in New Hampshire, Massachusetts, and other New England states. See id. ¶ 9.

One man was not wearing a face covering and was later identified as Defendant Christopher Hood. See Doc. 1 ¶ 17. Hood spoke with police and appeared to be the leader of the group. See id. ¶¶ 18–20. Police informed Hood that the group “cannot hang banners from the overpass without a permit because it violates a city ordinance[.]” Id. ¶ 21 (citing City of Portsmouth, NH Ordinances §§ 9.503, *et seq.*). Following this discussion, Hood gave instructions to the group members to remove the zip ties and remove the banners from the overpass fence. See id. ¶ 22. Some of the group’s members stood on the overpass and continued to display the banners by hand before returning to their vehicles and departing with the banners. See id. ¶ 23.

While police were addressing Hood, a person later identified as Defendant Cullinan approached in a silver pickup truck and angrily told police, “[y]ou’re not interfering with my friends and interfering with our rights.” See id. ¶ 25. Officers were present on the overpass and interacted with Hood for approximately 20-25 minutes before the group departed. See id. ¶ 24. As the group dispersed, some members of the group, including Hood, entered the silver pickup truck driven by Cullinan. See id. ¶ 26. The group then departed the scene. See id. NSC-131, through its social media profiles, took credit for the display of the banners that occurred on July 30, 2022. See Docket No. 89, Doc. 1 ¶ 27.

Pursuant to RSA 354-B:1, the State brought the instant action(s). As against Hood, the State alleges a direct violation by trespass as well as conspiracy to violate the Civil Rights Act. See Doc. 1 ¶¶ 27–36. As against Cullinan, the State alleges only conspiracy. See Docket No. 87, Doc. 1 ¶¶ 26–31. As against NSC-131, the State alleges only direct violation of the Civil Rights Act by trespass. See Docket No. 89, Doc. 1 ¶¶ 28–32. Defendants Hood and Cullinan now move to dismiss. See Docs. 11, 22.

Legal Standard

In ruling on a motion to dismiss, the Court determines “whether the allegations contained in the pleadings are reasonably susceptible of a construction that would permit recovery.” Pesaturo v. Kinne, 161 N.H. 550, 552 (2011). The Court rigorously scrutinizes the facts contained on the face of the third-party complaint to determine whether a cause of action has been asserted. In re Guardianship of Madelyn B., 166 N.H. 453, 457 (2014). The Court “assume[s] the truth of the facts alleged . . . and construe[s] all reasonable inferences in the light most favorable to the” non-moving party. Lamb v. Shaker Reg’l Sch. Dist., 168 N.H. 47, 49 (2015). The Court “need not, however, assume the truth of statements that are merely conclusions of law.” Id. The Court “may also consider documents attached to the . . . pleadings, or documents the authenticity of which are not disputed by the parties[,], official public records[,], or documents sufficiently referred to in the complaint.” Beane, 160 N.H. at 711 (cleaned up). “If the facts do not constitute a basis for legal relief, [the Court will grant] the motion to dismiss.” Lamb, 168 N.H. at 49.

Analysis

Hood and Cullinan raise two arguments in favor of dismissal. First, they argue

that the Complaints fail to state claims for relief under RSA 354-B:1. See Docs. 11 at 1–7; 22 at 1–7, 10. Second, they argue, under a variety of theories, that the conduct complained of is protected by the right to free speech. See Docs. 11 at 7–16; 22 at 7–10 (joining and incorporating by reference the arguments raised in Doc. 11). The State objects. See Docs. 14; 21. Though neither defendant raised the issue, the Court assumes without deciding that the State has standing for file the instant complaint.

I. Failure to state a claim under RSA 354-B:1

Hood and Cullinan argue that there was no “trespass,” and no threatened physical force or threatened damage to or trespass on property as defined by the Civil Rights Act. See Docs. 11 at 1–7; 22 at 1–7, 10. The State objects, arguing that it sufficiently alleged a trespass under the common law, RSA 236:27, and City of Portsmouth, New Hampshire Ordinances §§ 9.503, *et seq.*. See Docs. 14 ¶¶ 4–10; 21 ¶ 8. As to Hood’s and Cullinan’s second points, however, the State concedes that the Complaints do not allege threatened force, threatened damage to property, or threatened trespass to property; instead, the State alleges “actual trespass,” which is not defined in the Civil Rights Act. See Docs. 14 ¶¶ 11–16; 21 ¶¶ 11–12.

As a preliminary matter, the Court agrees with the State that it alleges actual trespass, and that this term is not defined in RSA 354-B:1, I.

All persons³ have the right to engage in lawful activities and to exercise and enjoy the rights secured by the United States and New Hampshire Constitutions and the laws of the United States and New Hampshire without being subject to actual or threatened physical force or violence against them or any other person or by actual or threatened damage to or trespass on property when such actual or threatened conduct is motivated by race,

³ Hood and Cullinan do not argue that “persons” for the purposes of RSA 354-B:1 does not include government entities. The Court therefore assumes for the purposes of this Order that “persons” includes the State or municipal corporations. See also RSA 21:9 (“The word ‘person’ may extend and be applied to bodies corporate and politic as well as to individuals.”)

color, religion, national origin, ancestry, sexual orientation, sex, gender identity, or disability. “Threatened physical force” and “threatened damage to or trespass on property” is a communication, by physical conduct or by declaration, of an intent to inflict harm on a person or a person's property by some unlawful act with a purpose to terrorize or coerce.

RSA 354-B:1, I.

Stated differently, this subsection contemplates, among other things, actual damage to property, actual trespass on property, threatened damage to property, and threatened trespass on property (along with the requisite motivation). While the act defines both “threatened physical force” and “threatened damage to or trespass on property,” it does not define actual physical force, actual damage to property, or actual trespass on property. Accordingly, the Court agrees with the State’s construction of RSA 351-B:1 and its Complaints in this regard. See id.; see also, e.g., Doc. 1 ¶ 28 (alleging that Hood “trespassed upon the property of the State of New Hampshire and the City of Portsmouth when he and other individuals displayed banners reading ‘Keep New England White’ from the overpass without a permit.”)

Having so concluded, the Court now turns to whether the Complaints state a claim for relief under the Civil Rights Act based on actual trespass. Hood and Cullinan do not argue that their placement of the banner, which read, “Keep New England White,” was not “motivated by race.” Accordingly, the Court limits its analysis to whether an actual “trespass” occurred.

Because the Civil Rights Act does not define actual trespass, the Court agrees with the State that it must turn to other sources of law to determine whether the conduct at issue here constitutes an actual trespass for the purposes of RSA 354-B:1. See Doc. 14 ¶¶ 4–9 (citing Rankin v. South St. Downtown Holdings, Inc., 172 N.H. 500, 504

(2019) for the proposition that legal terms of art must be construed according to the “peculiar and appropriate meaning” in law and discussing criminal trespass, common law civil trespass, and violations of a statute and a City of Portsmouth Ordinance governing displays on public roadways); see also RSA 21:2 (“[w]ords and phrases shall be construed according to the common and approved usage of the language; but technical words and phrases, and such others as may have acquired a peculiar and appropriate meaning in law, shall be construed and understood according to such peculiar and appropriate meaning”). The Court will address each type of alleged trespass, in turn.

The State’s allegation of actual trespass is that Hood and other members of NSC-131 “trespassed upon the property of the State of New Hampshire and the City of Portsmouth when [they] and other individuals displayed banners reading ‘Keep New England White’ from the overpass without a permit,” and that Cullinan conspired to do so. See Doc. 1 ¶ 28; Docket No. 87, Doc. 1 ¶¶ 26–31.

A. Criminal Trespass

To the extent the State argues that a criminal trespass occurred here, the Court disagrees. Under RSA 635:2, I, “[a] person is guilty of criminal trespass if, knowing that he is not licensed or privileged to do so, he enters or remains in any place.” Thus, “[a]n essential element of the crime is that the defendant know that he was not licensed or privileged to enter or remain on the premises.” State v. Wentworth, 118 N.H. 832, 839 (1978). As Hood and Cullinan point out, however, the Complaints fails to allege that they knew that they were not licensed or privileged to enter the bridge overpass and affix the banner, and in fact removed the banner upon request. See Docs. 11 at 2; 1 ¶¶

21–22 (alleging that after police informed Hood that they cannot hang banners from the overpass without a permit, he gave instructions to the group members who removed the banner from the fence). Accordingly, the facts alleged in the Complaints do not constitute criminal trespass. See Wentworth, 118 N.H. at 839. Even if they did, under New Hampshire law, a violation-level offense is not a crime.

B. Civil Trespass⁴

Hood and Cullinan argue that the State fails to allege a civil trespass because they removed the banner upon request and therefore did not “intentionally fail[] to remove from the land a thing which [they were] under a duty to remove.” See Doc. 11 at 2–3. Cullinan further argues that “[t]here was no ‘intentional invasion of the property of another’ by virtue of [Cullinan’s] or his friends’ presences on public property.” Doc. 22 at 3. As an initial matter, the Court agrees with the State that, for the purposes of civil trespass, “[a]ny allegation that the defendant[s] believed [they] could display the banner or that [they] removed the banner upon request does not absolve [them] of the trespass that occurred.” Doc. 14 ¶ 6 (citing Restatement (Second) of Torts § 164, which provides that “[o]ne who intentionally enters land in the possession of another is subject to liability to the possessor of the land as a trespasser, although he acts under a mistaken belief of law or fact . . . that he . . . has some other privilege to enter or remain on the land).

Further, the State contends that the Complaints allege a civil trespass because

⁴ Although the State forwards a common law civil trespass theory, such a position, in fact, appears contrary to the position the Attorney General took when the Legislature was deliberating whether to enact RSA 354-B. See Comments of AAG Ann Larney at p22 of the Hearing Committee minutes (stating that enforcement against conduct that violates the Criminal Trespass statute would pass constitutional muster).

Hood and members of NSC-131 “displayed a banner upon the fencing—causing a thing to enter upon land in possession of another, without any prior authorization from city or state authorities.” Doc. 14 ¶ 9 (citing Case v. St. Mary’s bank, 164 N.H. 649, 658 (2013)). The State further clarifies that it is not alleging a trespass on the basis of failure to remove from the land a thing which Defendants were under a duty to remove; rather, “[t]he variant at issue in this case . . . is . . . entering land in possession of another or causing a thing to do so.” Id. (citing Case, 164 N.H. at 658).

A trespass occurs when a person “intentionally . . . enters land in the possession of another, or causes a thing or third person to do so.” Case, 164 N.H. at 658 (quoting Restatement (Second) of Torts § 158). As a general matter, “the State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated.” Greer v. Spock, 424 U.S. 828, 836 (1976); see also RSA 637:2, IV; State v. Jordan, 500 P.2d 560, 562–63 (Haw. 1972); Hurley v. Hinckley, 304 F. Supp. 704, 709 (D. Mass. 1969), aff’d, 396 U.S. 277 (1970) (land, buildings, or property “of another” includes public property for purposes of trespass statutes). Thus, the Court disagrees with Cullinan that the fact that the property in question was public property automatically means that no civil trespass can occur.

Here, the State alleges that Hood and other members of NSC-131 entered and caused a thing to enter the land of another (here, either the City or the State, see Doc. 1 ¶ 4), therefore the allegations meet the technical definition of civil trespass set forth in Case.⁵ 164 N.H. at 658. Because this actual trespass was alleged to be “motivated by

⁵ The Court expresses no opinion on whether the City or State could maintain a civil trespass action under these circumstances. Instead, this conclusion stands only for the proposition that under the Civil Rights Act, the State sufficiently alleged the predicate conduct of an “actual trespass.” See RSA 354-B:1.

race,” the Complaints sufficiently state claims under the Civil Rights Act. See RSA 358-B:1

However, because the conduct at issue other than the content of the speech will bear on the free speech analysis to follow, the Court now addresses the State’s contentions that Defendants’ placement of the banner constituted a trespass based on City Ordinances and RSA 236:27.

C. Portsmouth City Ordinances

Hood and Cullinan argue that the Ordinances cited by the State have “no applicability to the facts plead in this matter” and that even if they violated the Ordinances, such a violation would not constitute a trespass. Doc. 11 at 3. The State disagrees, contending that the placement of the banner violated City Ordinances because the banners were placed on fencing along a public sidewalk in the City. See Doc. 14 ¶ 7 (citing City of Portsmouth Ordinances §§ 9.503, *et seq.*).

§ 9.503 provides, in pertinent part, “[n]o person shall install or maintain any public way obstruction which in whole or in part rests upon, in or over any public sidewalk, except news racks, without first applying for and being granted a license from the City Council.” The ordinances define a “public way obstruction” as “[a]ny object which in any way obstructs the free passage of pedestrians, wheelchairs or vehicles on the streets, sidewalks or roadways.” Id. § 9.501, D. Here, even assuming that the banner at issue rested “upon, in or over” the sidewalk of the bridge, the Complaints do not allege that the banner obstructed any traffic. See Doc. 1. Accordingly, to the extent a violation of § 9.503, *et seq.* constitutes a “trespass” for the purposes of RSA 354-B:1, the Complaints fail to allege a violation of these ordinances.

D. RSA 236:27 – Unauthorized Posting and Advertising

Hood and Cullinan argue that RSA 236:27 regulates commercial activity and thus does not apply to the banner at issue here, and even if it did apply, a violation of this section does not constitute an actual trespass.⁶ See Doc. 11 at 4. The State disagrees, arguing that “[t]he banner, even if not an advertisement, constituted a device or notice that was displayed for those passing by to observe. To the extent the laws at issue apply only to commercial conduct or advertisements, the defendant[s] used these acts to advertise NSC-131 and recruit support and members.” Doc. 14 ¶ 7. The State does not argue that the banner constituted a “trademark.”

RSA 236:27 provides: “[i]f any person shall in any manner paint, put upon or affix to a bridge, fence, or other structure, or upon a rock or other natural object, the property of another, without his consent, any device, trademark, advertisement, or notice, he shall be guilty of a violation.” Here, even assuming that a violation of this section constitutes a trespass, the Complaints do not allege that the banner, which read, “Keep New England White,” was a device, trademark, advertisement, or notice. Where, as here, “a term is not defined in the statute, [courts] look to its common usage, using the dictionary for guidance.” K.L.N. Const. Co., Inc. v. Town of Pelham, 167 N.H. 180, 185 (2014).

The most applicable definition of “device” in this context is “a piece of equipment or a mechanism designed to serve a special purpose or perform a special function.”

Webster’s Unabridged Dictionary (unabridged 4th ed.). The dictionary defines

⁶ Cullinan also argues that RSA 236:27 applies only to private property. See Doc. 22 at 5. However, as explained above, “property of another” includes public property. See Jordan, 500 P.2d at 562–63; RSA 637:2, IV.

“advertisement” as “a statement calling attention to something” or “a public notice, especially [] a paid notice or announcement published in some public print . . . or broadcast over radio or television.” Id.; see also ADVERTISEMENT, Black's Law Dictionary (11th ed. 2019) (“A commercial solicitation; an item of published or transmitted matter made with the intention of attracting clients or customers.”). While “notice” is a term of art in other areas of the law, the most applicable definitions of the word in the context used are a “formal or informal warning or intimation of something” or “a warning, announcement, or intimation given a specified time before the event to take place.” Webster's Unabridged Dictionary (unabridged 4th ed.); see also NOTICE, Black's Law Dictionary (11th ed. 2019) (“A written or printed announcement.”)

Here, the Complaints allege that Defendants affixed (or conspired to affix) a banner reading “Keep New England White” to a fence on the bridge overpass above Route 1. See Doc. 1 ¶ 5. The Complaints further allege that:

[t]he only reasonable interpretation is that the slogan and group's intention was to discourage people of color from residing in or visiting and making them feel unwelcome and unsafe in the New England region, New Hampshire, and Portsmouth. Thus, the defendant, through this trespass, intended to interfere with the lawful activities of those traveling along Route 1 by discouraging them from exercising their right to travel freely through the Granite State.

Id.

Applying the dictionary definitions to the State's allegations, the Court concludes that the banner is not a device, advertisement, or notice. If the legislature meant for RSA 236:27 to ban all signs, it could have done so. See K.L.N. Const. Co., 167 N.H. at 184 (the Court “interpret[s] legislative intent from the statute as written and will not consider what the legislature might have said or add language that the legislature did

not see fit to include”). Instead, the legislature limited the types of displays subject to regulation to those with some degree of a commercial nature, rather than Defendants’ political message (however abhorrent) in favor of racial homogeneity.

Further, the State’s contention that the Defendants used the banner “to advertise NSC-131 and recruit support and members” does not compel a contrary conclusion. Although this may have been a secondary purpose (which is not alleged in the Complaints), the State alleges that the principal purpose and meaning behind the banner was “to discourage people of color from residing in or visiting . . . New England[.]” Doc. 1 ¶ 5. Accordingly, the Court concludes that to the extent a violation of RSA 236:27 constitutes a “trespass” for the purposes of RSA 354-B:1, the Complaints fail to allege that Defendants violated this section in affixing the banner to the fence on the bridge overpass.

In sum, the Court preliminarily concludes that the State has stated a claim for relief under the Civil Rights Act, but only by way of the definition of “trespass” in the context of common law civil trespass against the City or State in their capacities as property owners. In other words, the Complaints adequately allege that Defendants directly or conspired to intentionally enter land in the possession of another, or cause a thing or third person to do so, see Case, 164 N.H. at 658, where such entry was motivated by race, see RSA 354-B:1. Accordingly, the Court proceeds to determine whether this construction of the Civil Rights Act violates the right to free speech.

II. Violation of the Right to Free Speech

Hood and Cullinan argue that the State’s construction of the Civil Rights Act violates the right to free speech. They raise challenges of overbreadth, vagueness, and

argue that the overpass in question was a “traditional public forum” and that the State’s construction fails a strict scrutiny analysis. See Docs. 11 at 7–16; 22 at 7–10. They also raise an as-applied challenge premised on their interpretation of the Complaints as alleging that the banner constituted a threat. See id. However, as explained above and as the State points out, the Complaints allege an actual trespass, rather than a threat, thus rendering this argument inapplicable.

As to the overbreadth and vagueness challenges, the State argues that “[t]he trigger of the Civil Rights Act violation was not what the banner said, but that the defendant[s] trespassed upon property of another when [they] affixed the banner to the overpass’s fencing. The text of the banner serves as evidence of the defendant’s racial motivation.” Doc. 14 ¶ 18. The State likens this case to Wisconsin v. Mitchell, where the United States Supreme Court upheld a sentencing enhancement which applied if a crime was committed against a victim because of the victim’s protected characteristics (such as race). See Doc. 14 ¶ 20 (citing Wisconsin v. Mitchell, 508 U.S. 576 (1993)). The State argues that under Mitchell, “the State acted well within the confines of both the New Hampshire and United States Constitutions when it filed complaints . . . for trespassing upon public property when that trespass was motivated by race.” Id. ¶ 22.

Further, the State contends that the fencing on the overpass in question constitutes a nonpublic forum. See Doc. 21 ¶ 13. According to the State, because the State’s and City’s restrictions on “the display of notices, signs, and other devices on city sidewalks and overpasses . . . do not discriminate on the speaker’s view or the content of the” communication, the regulation does not violate the right to free speech. See id. The State maintains that Defendants’ “act constituted a trespass and the plain language

of the banner demonstrates the racial motivation for their act.” See id. ¶ 15.

However, because the Complaints fail to allege that any definition of “trespass” other than a civil trespass against the City or State as defined in Case and the Restatement (Second) of Torts § 158(a) occurred here, this provides the framework for the free speech analysis to follow. See Case, 164 N.H. at 658 (quoting Restatement (Second) of Torts § 158, which explains that a trespass occurs when one “intentionally . . . enters land in the possession of another, or causes a thing or third person to do so”). Thus, the question before the Court is whether the State’s construction of the statute as it applies to this case - that it may bring a claim under the Civil Rights Act where a person’s mere presence on public property is motivated by race or another protected classification - violates the right to free speech. The Court concludes that it does.

Part I, Article 22 of our State Constitution provides: “Free speech and liberty of the press are essential to the security of freedom in a state: They ought, therefore, to be inviolably preserved.” N.H. Const. pt. I, art. 22. “Similarly, the First Amendment to the United States Constitution prevents the passage of laws ‘abridging the freedom of speech.’” Doyle v. Comm’r, New Hampshire Dep’t of Res. & Econ. Dev., 163 N.H. 215, 220 (2012) (quoting U.S. Const. amend. I). “It applies to the states through the Fourteenth Amendment to the United States Constitution.” Id.

The Court first addresses Hood’s and Cullinan’s claims under our State Constitution and cites federal opinions for guidance only. State v. Ball, 124 N.H. 226, 231 (1983). The Court first addresses the facial challenge. State v. Hynes, 159 N.H. 187, 200 (2009). To prevail, Hood and Cullinan must establish (1) that no set of circumstances exists under which the Civil Rights Act, RSA 354-B:1, would be valid; or

(2) that the Civil Rights Act is overbroad in that “a substantial number of its applications are unconstitutional, judged in relation to the Statute’s plainly legitimate sweep.” Doyle, 163 N.H. at 220–21 (quoting U.S. v. Stevens, 559 U.S. 460, 473 (2010)) (cleaned up).

The purpose of the overbreadth doctrine is to protect those persons who, although their speech or conduct is constitutionally protected, may well refrain from exercising their rights for fear of criminal sanctions by a statute susceptible of application to protected expression. While the Constitution gives significant protection from overbroad laws that chill speech within the First Amendment’s vast and privileged sphere, the application of the overbreadth doctrine is strong medicine to be employed only as a last resort. . . . The substantial overbreadth doctrine applies to constitutional challenges of statutes that prohibit conduct, as well as challenges to those statutes prohibiting pure speech and conduct plus speech. If a statute is found to be substantially overbroad, the statute must be invalidated unless the court can supply a limiting construction or partial invalidation that narrows the scope of the statute to constitutionally acceptable applications. If, on the other hand, a statute is not substantially overbroad, then whatever overbreadth may exist should be cured through case-by-case analysis of the fact situations to which its sanctions, assertedly, may not be applied.

State v. Theriault, 158 N.H. 123, 125–26 (2008) (cleaned up).

Although the Court would ordinarily begin by analyzing which type of “forum” is at play when the government regulates speech (or conduct that involves speech) on its property, see Doyle, 163 N.H. at 221, in this case, the State’s construction of the Civil Rights Act would permit it to regulate mere presence on any government property whatsoever, where such presence is “motivated by race, color, religion, national origin, ancestry, sexual orientation, sex, gender identity, or disability.” See Docs. 1, 11, 21; see also RSA 354-B:1. Thus, the Court proceeds to determine whether this construction is substantially overbroad, and if so, whether the Civil Rights Act is susceptible to a limiting construction or partial invalidation that cures the overbreadth. See Theriault, 158 N.H. at 125.

Here, although Hood’s and Cullinan’s overbreadth challenge focuses on the

speech at issue constituting a “threat,” rather than the conduct constituting a “trespass,” their examples of constitutionally permissible conduct which would fall within the ambit of the State’s construction apply with equal force in both contexts if the speech occurs on public property. See Doc. 11 at Ex. 1 (Event notice for “Keeping Harlem Black,” including a tour of “black Harlem”); Ex. 2 (“Save Chinatown”); Ex. 3 (“Keep America Christian”); (“Keep Boston Irish” protest in the street); Ex. 5 (“Black Power”). Although some of these examples reflect abstract images not tied to a particular place, they nonetheless reflect that if any of this speech occurred on public property, the State could bring a civil action against the speaker under the State’s construction.

Indeed, the State’s construction does not stop at messages motivated by race. Presumably, the State could bring a civil action against a person whose presence on public property is motivated by any other protected characteristic. For example, the State could, under this theory, bring a civil action against a person who walks on public sidewalks, knocking on doors to spread the message of their religion. The State could likewise regulate a person who drives a car on a public highway to a job working with people with disabilities. The State could prohibit abortion protests on the Statehouse lawn. “Such a law that confers on police a virtually unrestrained power to arrest and charge persons with a violation of the resolution is unconstitutional because the opportunity for abuse, especially where a statute has received a virtually open-ended interpretation, is self-evident.” Bd. of Airport Comm’rs of City of Los Angeles v. Jews for Jesus, Inc., 482 U.S. 569, 576 (1987) (cleaned up).

Moreover, the State’s comparison to Mitchell is unpersuasive. In Mitchell, the United States Supreme Court held that a Wisconsin statute providing for a sentencing

enhancement for aggravated battery where the defendant intentionally selected his victim on account of the victim's race did not violate the First or Fourteenth Amendments. 508 U.S. at 479. The court reasoned that "[t]he First Amendment . . . does not prohibit the evidentiary use of speech to establish the elements of a crime or to prove motive or intent." Id. at 489. The court rejected Mitchell's overbreadth challenge because "[t]he sort of chill envisioned here is far more attenuated and unlikely than that contemplated in traditional 'overbreadth' cases." Id. at 488.

We must conjure up a vision of a Wisconsin citizen suppressing his unpopular bigoted opinions for fear that if he later commits an offense covered by the statute, these opinions will be offered at trial to establish that he selected his victim on account of the victim's protected status, thus qualifying him for penalty enhancement. To stay within the realm of rationality, we must surely put to one side minor misdemeanor offenses covered by the statute, such as negligent operation of a motor vehicle for it is difficult, if not impossible, to conceive of a situation where such offenses would be racially motivated. We are left, then, with the prospect of a citizen suppressing his bigoted beliefs for fear that evidence of such beliefs will be introduced against him at trial if he commits a more serious offense against person or property. This is simply too speculative a hypothesis to support Mitchell's overbreadth claim.

Id. at 488–89.

Here, by stark contrast, the possibility that a person would suppress speech for fear of prosecution under the State's construction of the Civil Rights Act is far less speculative. For example, a person protesting on behalf of the Black Lives Matter movement would face the very real threat of prosecution for demonstrating on public property. On that basis, many such protesters would suppress those views and refrain from expressing them on public property based on their reasonable perception that the government or its actors do not share their views.

In light of the foregoing, the Court concludes that the State's construction of the

Civil Rights Act as prohibiting mere presence on public property, if motivated by a protected characteristic, is substantially overbroad. See Theriault, 158 N.H. at 125. Accordingly, although neither party advocates for a narrowing construction, the Court now turns to whether it “can supply a limiting construction or partial invalidation that narrows the scope of the statute to constitutionally acceptable applications.” See id.

The Civil Rights Act provides, in pertinent part:

I. All persons have the right to engage in lawful activities and to exercise and enjoy the rights secured by the United States and New Hampshire Constitutions and the laws of the United States and New Hampshire without being subject to actual or threatened physical force or violence against them or any other person or by actual or threatened damage to or trespass on property when such actual or threatened conduct is motivated by race, color, religion, national origin, ancestry, sexual orientation, sex, gender identity, or disability. “Threatened physical force” and “threatened damage to or trespass on property” is a communication, by physical conduct or by declaration, of an intent to inflict harm on a person or a person's property by some unlawful act with a purpose to terrorize or coerce.

II. It shall be unlawful for any person to interfere or attempt to interfere with the rights secured by this chapter.

RSA 354-B:1. The Court concludes that this section is susceptible to a partial invalidation that sufficiently narrows the scope of the statute.

For example, if the State were to bring a civil action against a person whose actual physical force or violence was motivated by race, this would fall squarely within the ambit of Mitchell and would therefore be constitutional.⁷ This analysis may also change if the legislature were to adopt a content neutral prohibition on all signs on bridge overpasses. However, the Court need not decide the complete scope of the

⁷ See § 2:13. Constitutional issues—Overbreadth, Hate Crimes L § 2:13 (collecting cases analyzed under Mitchell for the proposition that “courts that have been faced with the issue have found no constitutionally meaningful difference between penalty enhancement provisions and statutes that create a separate offense.”)

constitutionality of RSA 354-B:1 to resolve the present dispute. See State v. Berrocales, 141 N.H. 262, 264 (1996) (courts do not “decide questions of a constitutional nature unless absolutely necessary to a decision of the case”). Thus, the Court need only conclude that the State’s construction of the word “trespass” in RSA 354-B:1 as including the definition of trespass in Case as to public property is unconstitutionally overbroad. See Theriault, 158 N.H. at 125; see also Case, 164 N.H. at 658 (quoting Restatement (Second) of Torts § 158, which explains that a trespass occurs when one “intentionally . . . enters land in the possession of another, or causes a thing or third person to do so.”)

Having so concluded, the Court must further conclude that the Complaints fail to state a claim for relief under the Civil Rights Act. The conduct alleged in the Complaints, while reprehensible by most civilized standards, does not fit any definition of “trespass” other than the one the Court has concluded is unconstitutional (at least as to public property). Because the State clarifies that it is only proceeding on a theory of actual trespass, see Docs. 14; 21, and no constitutionally viable theory of trespass occurred here, the Complaints fail to state a claim for relief under the Civil Rights Act. Accordingly, the Complaints must be dismissed. See Lamb, 168 N.H. at 49.

Before closing, the Court notes that no motion to dismiss has been filed on behalf of NSC-131 as an unincorporated entity. However, because the same analysis applies to that entity (assuming it is a corporate entity that can be sued), the complaint against NSC-131 must be dismissed as well.

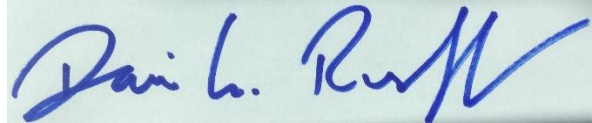
Conclusion

Consistent with the foregoing, Hood’s and Cullinan’s motions to dismiss must be

GRANTED and all pending claims are dismissed. See Docs. 11, 22. Because the Court dismisses the claims against Hood, it need not reach his demand for a jury trial. See Doc. 13. The hearings on 7-7-23 and 7-24-23 are cancelled.

SO ORDERED.

Date: June 5, 2023

A handwritten signature in blue ink, reading "David W. Ruoff", is displayed on a light blue background.

Hon. David W. Ruoff
Rockingham County Superior Court
Clerk's Notice of Decision
Document Sent to Parties
on 06/05/2023